***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

76-1599

To be argued by
PIERCE O'DONNELL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No.

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

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v.

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANJO PESUT,
and MARC VLASIC,

Defendants-Appellants.

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On Appeal From the Order of the
United States District Court
for the Eastern District of New York
Denying Defendants-Appellants'
Motions for Release Pending Appeal and Trial

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Docket No.

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ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANJO PESUT,
and MARC VLASIC,

Petitioners,

v.

HONORABLE JOHN R. BARTELS,
United States District Judge
for the Eastern District of New York,

Respondent.



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Petition for Writ of Mandamus

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BRIEF FOR DEFENDANTS-APPELLANTS/PETITIONERS

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# BRIEF FOR DEFENDANTS-APPELLANTS/PETITIONERS

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## ISSUES PRESENTED FOR REVIEW

1. Whether assuming that money bail in the amount of One Million Dollars ($1,000,000) for each defendant-appellant in a prosecution for aircraft piracy is appropriate under the circumstances, the District Court erred in refusing to order the release of defendants-appellants after notification by counsel that they were able to satisfy the Court's bail condition by posting Five Million Dollars ($5,000,000) collateral in the form of real property pledged by friends and supporters of the defendants-appellants.

2. Whether assuming the District Court's order of December 20, 1976, was based on a belief that the Court should refrain from granting bail or deciding motions involving bail pending the Government's appeal of the dismissal of two counts of the indictment, a writ of mandamus should issue directing the District Court to grant petitioners' motions for release pending appeal and trial.

## STATEMENT OF THE CASE

Defendants-appellants/petitioners (hereinafter "appellants") were indicted in the United States District Court for the Eastern District of New York (76 Cr. 602) on September 21, 1976. The three-count indictment charges violations of (1) 49 U.S.C. § 1472(i)(2) and 18 U.S.C. § 2 (air piracy, the commission of which resulted in a death, and attempt to commit air piracy); (2) 49 U.S.C. § 1472(i)(2) and 18 U.S.C. § 2 (air piracy and attempt to commit air piracy; and (3) 18 U.S.C. § 371 (conspiracy to commit air piracy). Joint Appendix at 1-3 (hereinafter "App."). United States Magistrate A. Simon Chrein fixed bail at One Million Dollars ($1,000,000) for each appellant. Unable at that time to post bail in that amount, appellants were remanded to the Metropolitan Correctional Facility in New York City.

On October 27, 1976, appellants moved for reduction of bail and release pending trial on conditions outlined by counsel. App. 4-97. On November 10, 1976, the Honorable John R. Bartels denied all bail motions and entered findings on the record. App. 126-33.

On November 22, 1976, Judge Bartels dismissed the first two counts of the indictment on the ground that venue

for the air piracy offenses was improper in the Eastern District of New York. The Government has appealed that decision, and oral argument in this Court is scheduled for January 14, 1977 (United States v. Busic, et al., Docket No. 76-1552). A motion by all appellants to expedite the scheduling of the Government's appeal and to provide for oral argument during the week of December 13, 1976, was denied by this Court on December 8, 1976. Judge Bartels has stayed the order dismissing Counts One and Two of the indictment and the trial of Count Three pending the hearing and determination of the Government's appeal from the dismissal of Counts One and Two.

During a status conference on December 6, 1976, appellants requested that Judge Bartels, in light of the dismissal of the first two counts of the indictment and the high amount of bail, reduce the bail set for each appellant by one-half to Five Hundred Thousand Dollars ($500,000) and release them on the other conditions proposed in their earlier motions for reduction of bail. App. 138-151. This application was denied from the bench. App. 149.

On December 14, 1976, appellants moved for release pending the Government's appeal of the dismissal of the first two counts of the indictment and pending any later trial.

App. 152-83. In support of their application, appellants submitted a "Schedule of Real Property Offered as Security for Bail," which disclosed that appellants had raised from among 173 individuals over Five Million Dollars ($5,000,000) in residential and business property as security for bail. App. 156-67. Judge Bartels denied appellants' request that they be released on the conditions outlined by counsel in their earlier motions for reduction of bail and upon the formal execution of Appearance Bonds by the aforementioned sureties. App. 202, 209-11. A timely notice of appeal was filed in the District Court.[1/]

This appeal is taken from Judge Bartels' order denying appellants' motion for release pending appeal and trial. This Court's appellate jurisdiction is invoked pursuant to 28 U.S.C. § 1291, 18 U.S.C. §§ 3147, 3148 and

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1/ In connection with the same events alleged in the federal indictment, appellants have been indicted in the New York County Supreme Court (Indictment No. 3879/76) for the offenses of murder in the second degree, kidnapping in the first degree, criminal possession of a dangerous weapon in the first degree, conspiracy in the first degree and assault in the first degree. Contrary to the suggestion in the District Court's order of December 20, 1976 (App. 211), Supreme Court Justice James Leff has taken under submission, and has not denied, appellants' applications for release pending trial of the New York State charges. App. 150, 192.

Rule 9(a) of the Federal Rules of Appellate Procedure. In the alternative, appellants petition this Court to issue a writ of mandamus directing the District Court to grant appellants' motions for release pending appeal and trial. This Court's mandamus jurisdiction is invoked pursuant to the All Writs Act, 28 U.S.C. § 1651, and Rule 21(a) of the Federal Rules of Appellate Procedure.

## STATEMENT OF FACTS

Appellants submitted to the District Court over 120 pages of affidavits, memoranda and other documentation in support of their efforts to obtain release from custody pending appeal and trial. This information, most of which stands uncontroverted and all of which is reproduced in the Joint Appendix, discloses in detail the backgrounds of the appellants as well as their reputations for honesty, reliability, trustworthiness and nonviolence. In addition, appellants' bail pleadings outline six highly restrictive conditions for release into the community tantamount to "house arrest". To avoid burdening this Court, this brief does not recite all of the facts presented to the District Court. However, to facilitate an understanding of the appellants' backgrounds, the proposed conditions for release,

and the proceedings below, a brief summary of the facts follows.

## Background of Appellants

### 1. Zvonko Busic

Zvonko Busic has firm community ties in the New York area. He has resided in Manhattan for the past one and one-half years. During that time, he has established solid roots. Until he was laid off, he worked steadily as an elevator operator at 7 West 96th Street. App. 30. He won the confidence and admiration of his employer and the tenants as an honest, reliable, and trustworthy person. App. 34. While living in Cleveland and Portland, he likewise found full-time employment and supported his family. App. 29-30. Busic has been offered several jobs if released pending appeal and trial. App. 32.

Busic's ties to this area extend to the religious and cultural life of the community. He is a faithful parishioner at Sts. Cyril and Methodius and St. Raphael's Roman Catholic Church. He regularly participates in social, political and educational activities of the Croatian Center adjacent to the church and the Croatian radio station. App. 30.

From all accounts, Zvonko Busic is an acknowledged leader in the community--a man to whom others look with

respect and admiration and a man of integrity who appreciates the meaning of a promise and would do nothing to bring dishonor to those who placed their faith in him. All affiants in the District Court had no doubts that he would abide by any release conditions established by the Court and that he would faithfully appear in court as required. App. 6-36.

Busic has never been convicted of a crime of violence. His brief encounters in 1971 with the criminal justice system in Cleveland did not result in any convictions for violent offenses. The charges stemming from an altercation among Yugoslavians were dismissed. The disorderly conduct charge was promptly dismissed once it was learned that he had not provoked the sudden attack in a Cleveland bar. Busic was released on a nominal bail of $200 in connection with both Cleveland charges. He appeared as required on five occasions, and his bail was returned to him both times. App. 31.

The appellant's friends, as well as religious and civic leaders in the community, have no reservations about his peaceful, nonviolent behavior if released pending trial. They do not consider him a danger to any particular person or to the community. Nor do they have any qualms about vouching

for his conduct as third-party custodians. App. 6-36.

2. Julienne Busic

Julienne Busic is a native-born American citizen. App. 61. She was raised in Portland, Oregon where her father is employed as a Professor of Classical Greek at Portland State University and her mother is a local high school teacher. An honors graduate of a Portland public high school, Julienne Busic graduated cum laude in March 1975 from Portland State University with a degree in German and a teaching certificate in English as a second language. At Portland State University she took no interest in political activity. App. 62.

While attending college and periodically studying in Europe between 1966 and 1973, Julienne Busic steadily held several part-time jobs in order to defray tuition and living expenses. App. 63. Upon graduation, she moved with her husband, appellant Zvonko Busic, to New York City where they resided until their arrest. From April 1975 until August 1976, Julienne Busic was steadily employed as an English teacher at the School for Computer Studies, 147 West 42nd Street, Manhattan. App. 63. She has been offered reemployment by her former employer if released pending appeal and trial. App. 66.

Julienne Busic has an unblemished record for nonviolence. She has never been arrested in the United States for any violation of law. App. 63. She enjoys an excellent reputation for honesty, trustworthiness and peaceful behavior among the people most familiar with her background and character. App. 64-66.

Julienne Busic's parents have provided her strong moral support since her arrest. They have informed counsel that they are willing to post as collateral for bail the only financial assets they have in their home and its furnishings, which have a cash equity value of approximately $50,000. This represents the sum total of their life savings and the only security they and their three other children are in a position to pledge.

3. Petar Matanic

Petar Matanic is a native born Croatian whose father was brutally killed by Communists during World War II while serving in the Croatian army. App. 91. After an impoverished childhood, Matanic served in the Yugoslavian military and was later employed on an agricultural farm in Croatia. App. 92. Desiring to live in a nontotalitarian state free from discrimination because of his minority status, Matanic emigrated to France in 1967, where he was

steadily employed for two years. App. 92.

In December 1969, Matanic came to the United States. He has lived since then in the New York City metropolitan area. Matanic worked continuously until March 1976 for a construction firm. He was laid off because of a slowdown in the construction industry. On August 10, 1976, Matanic became a citizen of the United States. App. 92-93, 133.

Matanic is widely regarded as an honest, trustworthy and reliable person. Numerous persons confirm that he is nonviolent and that he would honor all release conditions if released pending trial. He is an active participant in recreational, social and religious activities of the Croatian community in New York City. He has no prior arrests. App. 93-97.

4. Marc Vlasic

Marc Vlasic is a native-born Croatian whose parents were farmers. At age 19, he emigrated to France to live in a free society. After three years of steady employment in Paris, he came to the United States in 1969. App. 86.

After living for three years in the New York City metropolitan area, he moved to Connecticut where he resided

for four and one-half years until his arrest. For most of the seven years he has lived in the United States, Vlasic has been steadily employed. App. 87.

Ever since his arrival in the United States, Vlasic has been a regular parishioner at Sts. Cyril and Methodius and St. Raphael's Church, the Croatian Catholic Church in New York City. Vlasic enjoys a reputation for honesty, hard work and trustworthiness. He has never been convicted of a crime. App. 87.

Like his fellow appellants, Vlasic is a person of limited means. He has little or no money or property. Numerous persons express the firm belief that Vlasic would appear in court as required if released pending trial. App. 32-33.

5. Franjo Pesut

Franjo Pesut arrived in the United States in 1972. He is a resident alien and has a sister living in the United States. Prior to his arrest, he was employed as a machine operator. App. 130. His friends and acquaintances describe him as a quiet, non-assertive and decent man. App. 25. He regularly participates in social, athletic and religious activities of the Croatian community. App. 9, 23.

## Proposed Conditions for Release

On two occasions, counsel for appellants requested that in addition to a cash bail, Judge Bartels release appellants on the following conditions:

(1) placement in third-party custody of a designated person;

(2) residence at designated places of abode;

(3) restrictions on travel and limitations on the amount of time away from their residences;

(4) obtaining employment in New York City; and

(5) daily reporting requirements. App. 37-38, 168-69.

These proposed conditions were specifically tailored to strike a balance between the appellants' need to be free from the constraints of incarceration to assist in the preparation of their defense and the Court's obligation to minimize the prospect of flight. Moreover, if this be deemed a capital case, these conditions were designed to allay concerns that the appellants pose a danger to

the public.[2/]

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2/ In their motion for reduction of bail, appellants argued that the additional consideration of danger to the community under 18 U.S.C. § 3148 was inapplicable because Count One of the indictment did not charge a capital offense. App. 50-53. For purposes of this appeal concerning bail, appellants do not challenge the applicability of § 3148. Appellants submit, however, that their proposed release conditions, coupled with the posting of One Million Dollars ($1,000,000) collateral as bail for each appellant, amply satisfy the standards of the Bail Reform Act. Indeed, during the first bail hearing, the following significant colloquy concerning danger to the public occurred between Judge Bartels and David Rudolf, counsel for Julienne Busic:

> "[THE COURT:] Very frankly, I can say this is my own opinion. I do not believe that any of these defendants are the types of persons that would with a weapon injure any individual on the street or resort to any personal violence, but that is just not the only test here by any means.
>
> "MR. RUDOLF: It is relevant as to whether she poses a danger to anyone in the community.
>
> "THE COURT: I read all of the supporting affidavits with respect to all of these defendants, that they were nonviolent people. We can proceed from that basis.
>
> "MR. RUDOLF: Very well, if that is conceded, that is fine." App. 117.

To the extent that Judge Bartels' observation later in the same hearing concerning possibility of appellants' committing another hijacking if released pending trial (App. 132-33) is inconsistent with this earlier observation quoted above, we submit that there is no realistic prospect of appellants' committing the same or a similar offense if released. Under the proposed release conditions appellants are subjected to the equivalent of "house arrest." They will be drastically restricted in their freedom to travel and the daily reporting requirement--of appellants, their third-party custodians and their employers--amount to almost around-the-clock surveillance and sharply minimize the likelihood of flight. Moreover, the appellants no longer possess those documents necessary for foreign travel.

In their first bail motion, appellants requested that the District Court, in addition to imposing the five release conditions outlined above, lower their money bail from One Million Dollars ($1,000,000) to Fifty Thousand Dollars ($50,000). In light of the lower-income status of the appellants, this was viewed as a realistic and obtainable amount of money. Furthermore, the posting of a $50,000 bond, appellants argued, would require considerable sacrifice on the part of appellants and others and would furnish an added measure of assurance that they would appear as required.

As the following colloquy shows, counsel for the Government, Barry Schulman, acknowledged at the first bail hearing that the One Million Dollars ($1,000,000) bail was sufficient to minimize the prospects of flight and danger to the community.

> "MR. SCHULMAN: As we pointed out in our brief, and I am sure as the Court stated, the defendants can legitimately be denied bail. The Court has shown a great deal of leniency and liberality in setting bail in the amount of one million dollars. [This] was adequate as far as bail is concerned, was quite generous. . . .
>
> ****
>
> "I submit that the danger to the community is paramount [in a statement of appellant Zvonko Busic.]. . . . I think the million dollars possibly will insure that a repetition of this [aircraft piracy offense] will not occur.
>
> ****
>
> "As indicated by Mr. Tigar [,counsel for Zvonko Busic,] they may make [bail]. Certainly, when members of families have there

homes at stake, we can say possibly there won't be a repeat." App. 123-24.

Government counsel's reference to the homes of family members was prompted by the suggestion of appellants earlier in the first bail hearing that 20 members of the Croatian community had recently come forward to volunteer their personal residences as security for bail. App. 122-23, 134-46. The significance of this recent development was summarized by Mr. Tigar.

> "It seems to me that . . . if indeed the Croatian community, the 25,000 parishioners, are willing to say 'We trust these people, we trust them with everything that we built with our hands when we came to this country,' . . . that would be a significant factor in your Honor's reaching a decision." App. 123.

Five Million Dollars ($5,000,000) Worth of Security as Bail

In the month following the first bail hearing on November 10, 1976, a massive effort was organized to satisfy the Five Million Dollar ($5,000,000) bail requirement. Appellants' counsel contacted hundreds of members of the Croatian communities in the Chicago and New York City metropolitan areas who had expressed a desire to aid the defendants in posting the bail set by the District Court. As the Schedule presented to the District Court reveals, the net result of this monumental operation was a firm commitment by

173 individuals to post as security for the appellants' bail over 90 pieces of residential and business property valued in excess of Five Million Dollars ($5,000,000). App. 156-67.

In the process of interviewing the sureties, the following information was obtained about each piece of property offered as collateral: address and description of the security, the price and date of acquisition, and net worth of the property based on the difference between the fair market value and any outstanding balance on the mortgage. The fair market value was established from the surety's reasonable estimation of the value of the property based on comparable property values in the area, and, in some instances, based on a reasonable projection from valuation for tax assessment purposes or an offer to purchase the property. App. 153-54.

In their moving papers, appellants argued that the posting of One Million Dollars ($1,000,000) collateral for each appellant, coupled with the five other restrictive conditions, was more than sufficient to assure their presence at trial. All sureties interviewed by counsel has a complete understanding of the nature of their responsibilities and the consequences of their decision to post their property as security. Each surety:

(1) understands that his property will be legally committed as collateral to assure the presence of one or more appellants at trial;

(2) understands that the failure of one or more of the appellants to appear as required at any court proceeding might cause his property to be forfeited and that he might lose all rights and interest in the property and be forced to abandon the premises;

(3) states that no one has promised him, nor does he have any understanding, that in the event his property is forfeited on account of an appellant's failure to appear, his loss will be repaid by any individual, group of individuals, or organizations; and

(4) understands that if the property is accepted as collateral, he will be responsible for assuring the presence of the appellants at trial. App. 154-55.

In their latest bail application, appellants requested that Judge Bartels adopt several procedures to implement the proposed posting of collateral. These procedures were designed to minimize inconvenience to the District Court and to the sureties, some of whom live outside New York City and as far away as the Chicago metropolitan area. These recommended procedures included:

(1) the execution by all sureties of the Appearance Bond Form (Cr. Form No. 17)(App. 173-74), a standard form regularly used in the Eastern District of New York and elsewhere in the federal system as an instrument legally obligating the surety to assure the accused's presence at trial and acknowledging that the statement as to the property's value is made under oath and that the property posted as security is subject to forfeiture if the accused fails to appear at trial;

(2) execution of the Appearance Bond Form before any United States Magistrate or any Notary Public authorized by law to witness signatures; and

(3) designation by Judge Bartels of a United States Magistrate of the Eastern District of New York to be responsible for reviewing the Appearance Bond Forms and confirming that all conditions prescribed in the release orders have been satisfied.

The Government filed no formal opposition to appellant's latest proposed release conditions and implementation procedures. At the bail hearing, however, Government counsel expressed reservations about the District Court relying on the sureties' estimation of the value of their own property. App. 195. At no time before or

during the hearing did the Government indicate that it had any basis for drawing into question the sureties' estimation of the value of their collateral.

At the latest bail hearing, the Government also criticized appellants' bail application because no showing had been made that any of the sureties personally knew the appellants. App. 197. Counsel for appellants responded that many of the sureties actually knew the defendants, and added:

> ". . . I think there is a definitive, precise and dispositive answer to Mr. Pattison's concern. Of course, [the] surety is interested and must be interested in producing the defendant. [T]hat's not to say that a corporate surety, for example, of the kind that this Court sees every day must be personally familiar with every defendant bailed out of this Court. That would be a ridiculous state of affairs." App. 198.

Judge Bartels agreed with appellants' counsel and rejected the Government's argument on this point. App. 197-98.

In the course of denying appellants' latest bail application,[3/] the District Court agreed with appellants'

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3/ The reason for the District Court's rejection of the bail request is not free from doubt. During the hearing, Judge Bartels expressed an unwillingness to act while the case, in his view, "is in limbo" (App. 200), i.e., during the pendency of the Government's appeal of the dismissal of the first two counts of the

(footnote continued next page)

counsel that their comprehensive bail proposal, and the outpouring of community support for the appellants, were unprecedented.

Judge Bartels observed:

> "I think evidence of confidence and faith of the Croatian community [by] pledging all of their homes is most unusual, and I think it shows terrific confidence. . . . I don't think I've seen so many homes pledged before and that certainly is a self-sacrificing gesture to say the least. Not many people would do that, but that shows a close-knit Croatian unity. . . .

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3/ (footnote continued)

of the indictment. See App. 187, 205, 207-08, 211. However, the District Court's order explicitly states that "the motion to release the . . . defendants is under the circumstances denied." App. 211. During the bail hearing on December 20, 1976, Judge Bartels acknowledged that he possessed the power to pass on the bail request despite staying of all proceedings in the District Court and the pendency of the Government's appeal. App. 191.

Appellants submit that the comments of the District Court during the hearing, when read in conjunction with the order denying release, indicate that Judge Bartels denied the latest bail proposal on the merits. Accordingly, an appeal from that decision to this Court is proper. Nevertheless, in the event that this Court views the District Court's decision as a refusal to pass on the merits, appellants have taken the precautionary step of petitioning for a writ of mandamus directing Judge Bartels to grant the motions for release pending appeal and trial.

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"I have never seen such a thorough application for bail and citations of so many cases and such a terrific job done." App. 200, 202.

## ARGUMENT

### I.

### APPELLANTS SHOULD BE RELEASED FROM CUSTODY ON THE PROPOSED RELEASE CONDITIONS.

#### A. The Right to Nonexcessive Bail

Appellants' proposed release conditions must be reviewed in the context of the guarantee of the Eighth Amendment and the Bail Reform Act[4/] against excessive bail--

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4/ With the passage of the Bail Reform Act (18 U.S.C. §§ 3146-52), Congress sought to halt abusive bail practices and "to give meaning to some of our highest ideals of justice." United States v. Leathers, 412 F.2d 169, 170 (D.C. Cir. 1969). By its terms the Act creates a strong policy in favor of pretrial release. See, e.g., United States v. Edson, 487 F.2d 370, 372 (1st Cir. 1973); Wood v. United States, 391 F.2d 981, 983 (D.C. Cir. 1968); United States v. Leathers, supra, 412 F.2d at 171; cf. United States v. Fields, 466 F.2d 119, 121 (2d Cir. 1972) (presumption in favor of release even after conviction). Congress repudiated the notion that the key to the jailhouse door can be purchased only by those defendants affluent enough to pay money bail. See Russell v. United States, 402 F.2d 185, 186 (D.C. Cir. 1968); cf. Bandy v. United States, 82 S. Ct. 11, 12-13 (1961) (opinion of Douglas, J.). "The low priority given by Congress to monetary conditions was enacted into

(footnoted continued next page)

a fundamental right "basic to our system of law, Stack v. Boyle, 342 U.S. 1 (1951); Herzog v. United States, 75 S.Ct. 349, 351, 99 L.Ed. 1299, 1301 (1955)(opinion of Douglas, J.)." Schilb v. Kuebel, 404 U.S. 357, 365 (1971). Protection against confinement prior to trial serves to promote other cherished rights of the accused. As the Supreme Court has declared:

> "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See Hudson v. Parker, 156 U.S. 277, 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." Stack v. Boyle, supra, 342 U.S. at 4.

Pretrial release from confinement is an indispensable prerequisite for the effective assistance of counsel and the unimpeded investigation of the facts necessary for the preparation of defense. Cf. Bitter v. United States, 389 U.S. 15 (1967)(conviction reversed because defendant was improperly confined during trial). This is certainly true in this case

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4/ (footnote continued)

the statute in order to prevent pretrial detention resulting from indigency." United States v. Leathers, supra, 412 F.2d at 169. Federal bail law clearly favors "the release of an accused on the least restrictive alternative conditions which will provide reasonable assurance that the accused will appear in court." United States v. Cowper, 349 F. Supp. 560, 562 (N.D. Ohio 1972); see also United States v. Melville, 306 F. Supp. 124, 125-26 (S.D.N.Y. 1969); United States v. Erwing, 268 F. Supp. 879 (N.D. Cal. 1967).

where four of the five defendants are members of a small minority group.[5/]

The historical purpose of bail has been to assure the defendant's presence in court and his submission to the judgment of the court. See, e.g., Stack v. Boyle, supra, 342 U.S. at 4-5; Reynolds v. United States, 80 S. Ct. 30, 4 L.Ed.2d 46, 48 (1959)(opinion of Douglas, J.); United States v. Foster, 278 F.2d 567, 570 (2d Cir. 1960). As Judge Pollack has cautioned:

> "[T]he function of bail is not to purchase freedom for the defendant but to provide assurance of his reappearance after release on bail; guarantee of the obligation of the defendant to appear. The bail is not for the purpose of

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5/ As the Ninth Circuit stated in ordering the pretrial release of a minor defendant,

> "This is not a case where release from detention is sought simply for the convenience of the appellant. There is here a strong showing that the appellant is the only person who can effectively prepare his own defense. We may take notice, as judges and lawyers, of the difficulties often encountered, even by able and conscientious counsel, in overcoming the apathy and reluctance of potential witnesses to testify. It would require blindness to social reality not to understand that these difficulties may be exacerbated by the barriers of age and race. Yet the alternative to some sort of release for appellant is to cast the entire burden of assembling witnesses onto his attorneys, with almost certain prejudice to appellant's case." Kinney v. Lenon, 425 F.2d 209, 210 (9th Cir. 1970).

> providing funds to the government to seek the defendant should he go underground or flee the jurisdiction. Bail is intended as a catalyst to aid the appearance of the defendant when wanted." United States v. Melville, 309 F. Supp. 824, 826-27 (S.D.N.Y. 1970).

The amount of bail and conditions of release "must be based upon standards relevant to the purpose of assuring the presence of the defendant." Stack v. Boyle, supra, 342 U.S. at 5. "Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment. See United States v. Motlow, 10 F.2d 657 (1926, opinion by Mr. Justice Butler as Circuit Justice of the Seventh Circuit)." 342 U.S. at 5; see also United States ex rel. Rubinstein v. Mulcahy, 155 F.2d 1002 (2d Cir. 1946). Bail may not be denied, or set at an unrealistic level, because the defendant's presence cannot be conclusively guaranteed. "The law requires reasonable assurance but does not demand absolute certainty, which would be only a disguised way of compelling commitment in advance of judgment." United States v. Alston, 420 F.2d 176, 178 (D.C. Cir. 1969). Doubts about granting bail "should always be resolved in favor of the defendant." Herzog v. United States, supra, 99 L.Ed. at 1301.

The presumption of releasability applies with equal force in capital prosecutions. See, e.g., United States v. Harrison, 405 F.2d 355 (D.C. Cir. 1968)(felony murder); Stinnet v. United States, 387 F.2d 238 (D.C. Cir. 1967)(first-degree murder); Drew v. United States, 384 F.2d 314 (D.C. Cir. 1967)(first-degree murder). As one court held in reversing the denial of bail in a murder prosecution:

> "The District Judge apparently rested his finding of a risk of flight upon the severity of the sentence that could be imposed on appellant if she were convicted on the murder charge. If this factor alone were determinative, however, release would never be possible in a capital case, and the statutory scheme that Congress so carefully established for such cases [18 U.S.C. § 3148] would be nullified completely. . . . Though charged with a capital offense, appellant is presumptively releasable. . . ." White v. United States, 412 F.2d 145, 146-47 (D.C. Cir. 1968).

Federal bail law, both before and after the Bail Reform Act, has not recognized any category of offense for which, or types of offenders for whom, bail can be automatically or even routinely denied. For example, bail has been granted for "the most heinous case" such as treason, Carbo v. United States, 82 S.Ct. 662, 7 L.Ed.2d 769, 775 (1962) (opinion of Douglas, J.); for rape, robbery and sodomy, Ball v. United States, 402 F.2d 206 (D.C. Cir. 1968); and

piracy, United States v. Jones, 26 F.Cas. 658 (No. 15495) (C.C. Pa. 1813). Bail cannot be denied "merely because of the community's sentiment against the accused nor because of an evil reputation." Carbo v. United States, supra, 7 L.3d 2d at 772; see also Cohen v. United States, 82 S.Ct. 8, 7 L.Ed.2d 13, 14 (1961). Nor may bail be denied because the accused is not a United States citizen. United States v. Honeyman, 470 F.2d 473 (9th Cir. 1972); United States v. Bobrow, 468 F.2d 124 (D.C. Cir. 1972).

Under both § 3146 and § 3148, the burden is on the Government to establish that one or more recommended release conditions will not reasonably guarantee the accused's presence or minimize any threat to the community. Leary v. United States, 431 F.2d 85, 89 (5th Cir. 1970); Ward v. United States, 76 S.Ct. 1063, 1 L.Ed.2d 25 (1956). Bail may be denied only for "the strongest of reasons," Sellers v. United States, 89 S.Ct. 36, 21 L.Ed.2d 64, 66 (1968); and "only in cases in which, from substantial evidence, it seems clear that the right to bail may be abused or the community may be threatened by the applicant's release." Leigh v. United States, 82 S.Ct. 994, 8 L.Ed.2d 269, 271 (1962) (opinion of Warren, C.J.). "Danger" for purposes of bail cannot encompass the constitutionally protected exercise of speech, press, and associational freedoms. Williamson

v. United States, 184 F.2d 280 (2d Cir. 1950) (opinion of Jackson, J.); Leary v. United States, supra, 431 F.2d at 89.

The requisite showing of dangerousness must relate "to some kind of danger that so jeopardizes the public that the only way to protect against it would be to keep the applicant in jail." Sellers v. United States, supra, 21 L.Ed.2d at 67 (emphasis supplied). In setting bail for defendants charged with the "grave and alarming" offense of conspiracy to bomb numerous buildings in New York City, Judge Frankel stressed that, although the Government's evidence "is seemingly substantial" and "[t]he objectives of the alleged conspiracy are . . . terrifying," the defendants are presumed innocent and bailable. United States v. Melville, supra, 306 F. Supp. at 125, 128.

B. The Nonmonetary Release Conditions

The stringent nonmonetary release conditions proposed by appellants--amounting to virtual "house arrest"--are designed in response to the mandate of the Eighth Amendment and the Bail Reform Act that release conditions be flexible, imaginative, and individualized. See, e.g., United States v. Fields, supra, 466 F.2d at 121; United States v. Bronson, 433 F.2d 539 (D.C. Cir. 1970); Banks v. United States, 414 F.2d 1150, 1154 (D.C. Cir. 1969); People of the State of

New York v. Hutchinson, supra, 360 F.2d 759, 762 (1966) absolute certainty of the defendant's appearance is not the standard for setting bail.

> "[This] plan would involve risk. But this is not decisive; for any release plan--however partial or limited--necessarily involves risk. Congress understood this very well, and only asked that the risks taken be not exesssive, that the conditions be such as 'to reasonably assure that [the person] will not flee. . . .'
>
> "The question, then, is the assessment of the extent of the risk." Banks v. United States, supra, 414 F.2d at 1154 (Leventhal, J., dissenting).

The recommended conditions have received widespread acceptance in the federal courts as realistic safeguards for the release of a defendant pending trial. For example, in Chambers v. Mississippi, 405 U.S. 1205 (1972), Mr. Justice Powell ordered the petitioner's release pending consideration of his petition for writ of certiorari. To assure that the petitioner would not flee or pose a danger to any other person, Justice Powell imposed several conditions on his release identical to those suggested by counsel in this case, including living at a designated place of residence, employment, and periodic reporting to a public official.

The restrictions involving third-party custody, residence and employment establish, as well as take advantage

of the appellants' community ties. See Ball v. United States, supra, 402 F.2d at 207-08; cf. United States v. Bronson, supra, 433 F.2d at 540 (a serviceman's "lack of close family and community ties is not an insurmountable obstacle to pretrial release [and can be overcome] by the imposition of carefully chosen conditions"). The appellants

> "stability and ties to the community are further demonstrated by the concern manifested by several members of [their] church, [several] of whom offered [them] . . . a home to live in should [they] gain release." Banks v. United States, supra, 414 F.2d at 1153.

A requirement of reporting by the appellants, their custodians, and their employers is an established means for assuring their presence. See, e.g., Sellers v. United States, supra, 21 L.Ed.2d at 68; Ball v. United States, supra; United States v. Alston, 420 F.2d 176, 178 (D.C. Cir. 1969).

> "Well-designed reporting procedures can reduce the temptation to flee by providing prompt communications with judicial authorities if the individual departs from his usual routine. If conditions of release are violated, such a report can lead to prompt apprehension and possible prosecution under the criminal bail-jumping provision. All conditions of pretrial release have as their goal the close supervision of the defendant in order to curtail his opportunity to flee. A desirable by-product is that often any danger to the public presented by the release can also be minimized." United States v. Leathers, supra, 412 F.2d at 172-73.

The prophylactic effect of a reporting procedure is appreciably enhanced by the recommended requirement that the appellants make daily reports. See United States v. Melville, supra, 306 F. Supp. at 129.

Appellants no longer possess the legal documents for foreign travel. United States v. Cook, 442 F.2d 723, 724 n.1 (D.C. Cir. 1970). Territorial limitations as a condition of pretrial release are effective and well-established. United States v. Foster, supra, 278 F.2d at 570. To further minimize the likelihood of flight, appellants are willing to submit to restrictions concerning the amount of time away from their designated residences.

C. Procedures for Posting Security

In the District Court, the Government appeared to argue that appellants could not satisfy the Five Million Dollar ($5,000,000) bail requirement in the manner recommended by them--execution by sureties under oath of the standard Appearance Bond Form--because the value of each piece of property had not been conclusively established by some independent means of appraisal. This argument is manifestly unsound.

As the moving papers conclusively show, appellants have established much more than a prima facie case of satisfying the money bail requirement. Indeed, they

have gone considerably further in providing comprehensive, detailed information about the sureties and their collateral than is required in other criminal cases in which sureties merely execute the Appearance Bond Form. Now that they have gone the extra distance and have marshalled an unprecedented amount of collateral, they are met with the argument that they must present additional proof of the value of this package of security--apparently in the form of multiple on-premises real estate valuations of over 90 pieces of property in four states. This contention has a decidedly hollow ring and conveys the impression that no matter how much appellants do and no matter how onerous a money or other requirement they satisfy, the Government will find some other objection to deny them their freedom.

Nor is there any need for a hearing such as that approved in United States v. Nebbia, 357 F.2d 303 (2d Cir. 1966). In Nebbia the Government objected to the defendant's attempt to satisfy a One Hundred Thousand Dollar ($100,000) cash bail requirement by tendering a cashier's check. The District Court ruled that the posting of the cashier's check was sufficient. On the Government's petition for writ of mandamus, the Second Circuit held that the District Court was acting under a mistaken impression of the extent of

its authority to hold a hearing where cash bail has been posted. Under Nebbia, the trial court is permitted, but is by no means required, to explore "the adequacy of the bail and . . . the ability of the surety to produce the defendant." 357 F.2d at 304.

A Nebbia-type hearing is clearly unnecessary in this case. First, the concerns expressed by the Government in Nebbia--the posting of cash from an anonymous source--are not present here. The identity of the sureties has been fully disclosed. They are respectable, law-abiding, and hard-working individuals. There is absolutely no evidence that they would shirk their duty to guarantee the presence of the appellants as required.

Second, the reliability of these sureties, many of whom know the appellants, in assuring the appellants' strict compliance with all release conditions is certainly as great as a corporate surety or bailbondsman with no prior contact with appellants.

Third, the sureties' trustworthiness in fulfilling their responsibilities is heightened by their unqualified commitment of their homes and businesses--the savings of a lifetime--to aid these appellants. As Judge Bartels recognized, the Croatian community in this country

has expressed its willingness in striking terms to stand as surety for these defendants.

Finally, any concern about the reliability of the sureties'valuation of their property is unwarranted. The Appearance Bond Form--on which the net worth of the collateral is stated--is executed under oath. Any willful misstatement in this regard would subject the surety to liability under 18 U.S.C. § 1001. Moreover, the figures used for the net value of the property are reasonable and are not inflated. The Government has presented no reason for departing from the customary procedure of Rule 46(d) of the Federal Rules of Criminal Procedure and allowing these sureties to post collateral by executing an Appearance Bond Form before any United States Magistrate or a Notary Public authorized by law to witness signatures.

II.

IF THE ORDER OF DECEMBER 20, 1976 WAS BASED ON A BELIEF THAT THE DISTRICT COURT SHOULD REFRAIN FROM GRANTING BAIL OR DECIDING BAIL MOTIONS PENDING THE GOVERNMENT'S APPEAL, A WRIT OF MANDAMUS SHOULD ISSUE DIRECTING THE DISTRICT COURT TO RELEASE APPELLANTS.

In the event that this Court views Judge Bartels' order as a decision not to decide appellants' bail motions,

see note 3, supra, the appropriate remedy is a writ of mandamus to compel him to exercise his authority in light of his duty to grant the requested relief. See Roche v. Evaporated Milk Association, 319 U.S. 21, 26 (1943); International Products Corporation v. Koons, 325 F.2d 403, 407 (2d Cir. 1963). In United States v. Nebbia, supra, when the Government sought review of the District Court's refusal to hold a hearing on the sufficiency of the bail, the Government filed an appeal and a petition for writ of mandamus. This Court stated:

> "Nebbia is presently under detention. In the interest of expedition, the Court treats the appeal as a request for a writ. Mandamus has long been recognized to compel a judge or officer to exercise discretion which he has erroneously considered himself to lack. Work v. United States ex rel. Rives, 267 U.S. 175, 184, 45 S.Ct. 252, 69 L.Ed. 561 (1925)." United States v. Nebbia, supra, 357 F.2d at 305.

The District Court had an obligation to decide the bail motions on the merits. By statute appellants were required to seek release under the proposed conditions in the District Court in the first instance. 18 U.S.C. § 3147(b). This is particularly true since the latest bail applications sought approval of a plan for posting security never before presented by appellants to the District Court.

Under Rule 9(a) of the Federal Rules of Appellate Procedure, appellants were required to obtain written reasons from the District Court for denying release before they could appeal. Moreover, by analogy, Rule 9(b) requires that application for release pending appeal from conviction "shall be made in the first instance in the district court." The same is necessarily true pending the Government's appeal from a pretrial ruling of the District Court. See 18 U.S.C. § 3731.

While appellants believe that mandamus is proper if the District Court's decision can be construed as a refusal to decide the motion, we submit that Judge Bartels' order should be read as a refusal on the merits to grant release on the conditions proposed by appellants. See note 3, supra. Consequently, for the reasons discussed at pages 21-33, this Court should order that appellants be released on the proposed conditions or any additional conditions considered appropriate under the circumstances.[6/]

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6/ Under 18 U.S.C. § 3147(a), this Court "may, with or without additional evidence, order the [accused] released pursuant to section 3146(a)."

## CONCLUSION

Appellants have been incarcerated for over three months. Their attempts to secure release pending trial have been repeatedly frustrated. Having accomplished the Herculean task of raising the Five Million Dollars ($5,000,000) bail demanded by the District Court, they are now told that they must hurdle still more procedural obstacles in their struggle to be free. It is time for this Court to put an end to this unfair treatment.

We respectfully request that the decision of the District Court be reversed and that the appellants be released on the conditions and pursuant to the procedures outlined by their counsel in their motions for release pending appeal and trial. In the alternative, we respectfully request that a writ of mandamus issue directing the District Court to release the appellants on the conditions and pursuant to the procedures outlined by their counsel in their motions for release pending appeal and trial.

Respectfully submitted,

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Dated: December 23, 1976

AFFIDAVIT OF SERVICE

CITY OF WASHINGTON )
) ss.
DISTRICT OF COLUMBIA )

PIERCE O'DONNELL, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On December 23, 1976, I served the Brief for Defendants-Appellants/Petitioners and the Joint Appendix.

3. Service was effected by depositing two copies each of the Brief for Defendants-Appellants/Petitioners and the Joint Appendix, first-class postage prepaid, in the United States Mails at Washington, D. C. as follows:

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United States District Judge
Eastern District of New York
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Brooklyn, New York 11201

Thomas R. Pattison, Esq.
Assistant United States Attorney
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Eastern District of New York
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Pierce O'Donnell
PIERCE O'DONNELL

Subscribed and sworn to before me this 22 day of December, 1976.

Notary Public
My Commission Expires September 30, 1977